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No. 98-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM C. MARTIN,

Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REASONS FOR GRANTING THE WRIT

I. BAUGH'S FACTUAL ARGUMENTS IN HIS BRIEF IN OPPOSITION ARE INAPPROPRIATE.

Baugh's argument in opposition to Martin's petition dwells on the facts of this case, and the facts relied upon by Mr. Martin. Baugh's factual arguments are inappropriate, for several reasons, as set forth below.

Though Martin believes that it is not appropriate to weigh the facts, given the questions presented by him for review, and given the procedural status of this case (post summary judgment), he is reluctant to allow Baugh's factual argument to go unanswered. For this reason, he addresses Baugh's factual arguments briefly.

A. Martin's petition arises from the Eleventh Circuit's erroneous statement of what the law is, and does not arise from the Circuit Court's evaluation of the facts in this case. The Eleventh Circuit recites that it evaluated Martin's *allegations*, and not any party's proof.

Martin's petition to this Court arises from the Eleventh Circuit's erroneous statement of what the law is, and not from that court's evaluation of the facts, nor from its application of the allegations or facts of this case. As the Eleventh Circuit stated in its opinion, "Nor does Martin allege facts" sufficient to pass the *Pickering* balancing test. [Petition at p. 7a] Because the petition addresses the law, it is inappropriate and irrelevant for Baugh to argue the facts to this Court.

Martin's legal issues are important, however. As set forth below, had the Eleventh Circuit applied the allegations or demonstrated facts of this case to the correct legal standards, the result would have been different.

B. Despite the Circuit Court's focus on Martin's allegations, Baugh argues the facts, and seeks to have for himself the benefit of inferences from those facts. This petition arises from Baugh's motion for summary judgment, and thus he is not entitled to such inferences.

Furthermore, Baugh seeks to have for himself the benefit of inferences from the facts. For example, Baugh argues that Martin's statements were exclusively "technical," and that the reason Martin spoke was to protect his job. These assertions are not factual, but are conclusory and argumentative statements by Baugh, and are his effort to have the benefit of inferences from facts at issue in the case.

Naturally, Martin disputes Baugh's spin on the facts. Also, it is incorrect for Baugh to have the benefit of inferences given the posture of this case, post summary judgment.

C. Baugh asserts, incorrectly, that certain matters of fact are not disputed or disputable.

Martin emphasizes to the Court that Baugh's assertion that various facts in this case are "beyond genuine dispute." This is simply not a correct statement, generally. It is certainly not a correct statement with respect to the particular facts Baugh has chosen to mention in his opposition. If nothing else, Baugh fails to recognize that the trial court has already held that the facts are genuinely disputable, and that the trial court's evaluation of the facts in this case has not been questioned by the Eleventh Circuit.

II. CONTRARY TO BAUGH'S ARGUMENT, THE ELEVENTH CIRCUIT HAS NOT APPLIED "MAINSTREAM" LEGAL PRINCIPLES IN THROWING OUT MARTIN'S CLAIMS. THE ELEVENTH CIRCUIT'S STATEMENT OF LAW IS IN STARK CONTRAST TO THE PLAIN GUIDANCE OF THIS COURT, AND ALSO OF THE TENTH CIRCUIT.

A. Martin shows this Court that the Eleventh Circuit has invented a legal analysis for the First Amendment claims of government employees that is analogous to the burdensome circuit court schemes rejected by this Court in *Lanier* and *Crawford-El*.

In his petition, Martin showed this Court how the Eleventh Circuit has departed from the guidance of this Court in *United States v. Lanier*, 117 S. Ct. 1219 (1997) and *Crawford-El v. Britton*, 117 S. Ct. 2451 (1998), among others. In particular, Martin highlighted the way this Court has, in the past, granted certiorari to correct novel legal analyses put together by circuit courts that depart from the fundamental qualified immunity rule of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In Baugh's opposition, he attempts to distinguish *Crawford-El* by observing that the circuit court's error in that case was to raise the evidentiary burden of proof to "clear and convincing," and that the Eleventh Circuit in Martin's case did not alter the burden of proof from "preponderance." This argument serves to highlight the Eleventh Circuit's actual error in this case.

The Eleventh Circuit did not *duplicate* the error of *Crawford-El*, by raising the standard of factual proof. Rather, the Eleventh Circuit's error was an analogous error, of raising the standard of legal proof. The Eleventh Circuit did this in two different ways.

First of all, it articulates and applies a heightened burden on the plaintiff to show notice to the defendant that his conduct was unlawful. This is the "materially similar" test set out in the Eleventh Circuit's opinion, as well as the emphatic language about making it "obvious" to "every" defendant that his conduct is unlawful. As the Court explained in *Lanier*, it was error for the circuit court to express its test as requiring precedent that is "fundamentally similar." *Lanier*, 117 S. Ct. at 1227.

The law requires "reasonable" conduct, and this Court has granted certiorari in *Lanier*, as in *Crawford-El*, to prevent the circuit courts from raising the bar, overly or covertly, by articulating tests by using words like "fundamentally similar" and "materially similar." As set out below, this argument as to the words used to describe the legal standard is not merely semantic, or a question of degree. The Eleventh Circuit's statement of law is wrong, and its error caused it to reach the wrong result, as set forth below.

Second, it erroneously inserts the *Pickering-Connick* balancing analysis into the determination whether the plaintiff's speech is protected, as discussed below. By erroneously inserting this balancing test, with its fact specific outcomes, the Eleventh Circuit puts the burden on the plaintiff so show that someone else has already filed the same case, and prevailed.

B. Martin's argument is that the Eleventh Circuit has cobbled an wholly erroneous legal analysis of the First Amendment claims of public employees. Martin does not argue that the Eleventh Circuit has made an error of degree.

Baugh argues that Martin merely disputes the precise wording of the law, or disputes a nuance of the law. [Opposition p. 10] This is not a correct statement. The error Martin has shown to this Court is analogous to the difference between "preponderance" with "clear and convincing." This is not a nuance, this is a fundamental distinction in the law. Similarly, Martin has shown this Court the way that the Eleventh Circuit has articulated a legal standard for First Amendment claims of public employees that is both in word and deed a quantum raising of the bar against such a plaintiff, contrary to the decisions of this Court.

One way we know that the bar has been raised a full notch is that, given the facts or allegations in this case, a correct statement of the law would result in the opposite result, as set forth below.

Furthermore, Martin shows this Court how the Eleventh Circuit has actually stood *Connick* on its head, by making Martin undertake to show or to predict the ability of Baugh to justify his unreasonable actions. The Eleventh Circuit has done this by requiring Martin to demonstrate how the assertedly "unpredictable" *Pickering* analysis would turn out for Baugh, in the unique factual context of this case. This is an inversion of the correct law from *Connick*, which provides that Baugh must justify

his own actions, as set forth below. By imposing *Pickering* on Martin, the Eleventh Circuit sets up a legal Catch 22 for Martin. This is not a matter of nuance.

III. THE ELEVENTH CIRCUIT ERRED IN ITS ANALYSIS OF WHAT CONSTITUTES A "CLEARLY ESTABLISHED" RIGHT, BY INCLUDING *PICKERING-CONNICK* BALANCING INTO THAT ANALYSIS. BAUGH'S ARGUMENT HIGHLIGHTS THIS ERROR.

Baugh asserts that Section II of his petition is unclear, and fails to meet the argument of Section II. To the extent that Martin's discussion of this issue is unclear, it may be made clear in a few paragraphs.

The Eleventh Circuit articulates an erroneous test for whether a plaintiff's speech is protected. It states that the plaintiff must show that his speech was a matter of public concern, and *also* that the value of the speech outweighs the potential disruption. [Petition at p. 6a] This two part test is contrary to the law of this Court.

The Eleventh Circuit errs by inserting the balancing test into the analysis of whether the public employee's speech is protected in the first place. The correct analysis is to determine whether the speech was of public concern. If so, the speech is protected, and the plaintiff has shown his clearly established right — not to be punished for making protected statements.

This is the analysis of *Connick v. Meyers* itself. 461 U.S. 138, 149-50 (1983). In *Connick*, the Court found that one of the plaintiff's statements touched upon a matter of public concern. The Court also found that her statement contributed to her discharge from government employment. Her "right" was to be free from punishment for making statements of public concern. At that point, the Court wrote that "we must determine whether Connick was justified in discharging Myers." 461 U.S. at 149. The Court noted that the public concern issue was a threshold issue, and then Court wrote that

> after which *it became the government's burden* to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities.

461 U.S. at 150 (emphasis supplied).

In other words, a government employee has a clearly established right, under *Connick*, to be free from retaliation in that employment for making statements of public concern. Where the plaintiff shows that his statements are of public concern, he has stated his claim to that right. Only then does the issue of balancing come up, as the defendant's burden to justify his own conduct. Under *Connick*, that balancing is not part of the plaintiff's case. Balancing is part of the *defendant's burden* to justify unreasonable conduct.

Martin is not the only person who interprets the law this way. One case where this analysis is done correctly is *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584 (10th Cir. 1994). In *Ramirez*, the court analyzed the case for the clearly established right in section C.1. of its opinion. The court wrote that "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." 41 F.3d at 593. The analysis for a clearly established right focussed on whether the plaintiff's statements were of public concern, referring to Oklahoma statutes supporting the conclusion that the statement were of public concern. The court concluded that the statements were of public concern, and wrote that "We are persuaded that plaintiffs have shown a clearly established right." 41 F.3d at 594. Only then, in section C.2. of its opinion, did the court address "Pickering balancing." 41 F.3d at 594.

Regarding balancing, the court wrote that "Our conclusion that Dr. Ramirez and Ms. Snow possessed a clearly established right to file the patient grievance does not end the enquiry," and moved on to *Pickering*. The court wrote that, "To justify restricting employee' speech, *defendants must show*, inter alia, 'actual disruption of services. . . .' " 41 F.3d at 594 (emphasis supplied). The court also wrote that "And defendants must show that the disruption outweighs the First Amendment right of the employees. *See Pickering*, supra." 41 F.3d at 594.

The court noted that defendants retain the right to assert the qualified immunity defense throughout the proceedings, as the facts develop more fully. 41 F.3d at 595.

Ramirez shows the correct legal analysis of a public employee's First Amendment claim where qualified immunity has been raised. In contrast, the Eleventh Circuit in Martin's case holds that Martin must

take on the burden of showing whether his statements are outweighed, in order to establish that his speech was protected. This holding is clearly erroneous, and also is the basis for the Eleventh Circuit's impossibly high burden on the plaintiff to show a "materially similar" case.

More importantly, in Martin's case, the Eleventh Circuit makes Martin have to predict how the *Pickering* balancing test will come out, before the Eleventh Circuit acknowledges that the plaintiff has shown his clearly established right. This is the fundamental error of the Eleventh Circuit's opinion. This Court requires a plaintiff to show only a clearly established *right*. The Eleventh Circuit requires a plaintiff to show that he'll actually prevail, or that someone else has prevailed in the same claim, over a defendant's case-by-case justification.

The end result of the Eleventh Circuit's misstatement of the law is to upset the balance established by *Harlow*. This Court should step in now to correct the error, as it did in *Lanier*, and *Crawford-El*.

IV. THIS CASE PRESENTS AN EXCELLENT AND TIMELY OPPORTUNITY TO REFORM QUALIFIED IMMUNITY AS IT IS PRACTICED IN THE CIRCUIT COURTS.

A. Baugh's opposition reveals additional conflict among the circuits.

Baugh cites *Brewster v. Board of Education*, 149 F.3d 971, 979-80 (9th Cir. 1998) as supporting his argument that the Eleventh Circuit has simply applied a "mainstream" rule of law for public employee First Amendment claims, reporting that *Brewster* adopts an analysis like the Eleventh Circuit in this case, and also that *Brewster* has a string cite of such cases. Indeed, *Brewster* does show that there are a host of bad decisions where circuit courts have erroneously used *Pickering* balancing to undermine the law established by this Court in *Harlow*. Baugh even highlights that cases like Martin's are tough because courts have substituted "balancing tests rather than bright-line rules." [Opposition at p. 9] This substitution of a fuzzy, fact-intensive test in place of the simple "clearly established" analysis of *Connick* and *Ramirez* is a flagrant rejection of this Court's decisions. Time and again, this Court has stated, or admonished, that qualified immunity analysis is meant to be simplified, and to avoid unpredictability for *either party*, to the extent possible. In *Elder v. Holloway*, 127 L. Ed. 2d 344, 350 (1994), this Court wrote that

> The central purpose of affording public officials qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability. *Harlow v. Fitzgerald*, supra at 806. The rule announced by the Ninth Circuit does not aid this objective because its operation is unpredictable in advance of the district court's adjudication. Nor does the rule further the interests of the *other side of the balance*: deterring public officials' unlawful action and compensating victims of such conduct.

See also Lanier; *Crawford-El*; *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) ("We are unwilling to Balkanize the rule of qualified immunity by carving exceptions . . .").

Baugh highlights the fact that the Eleventh Circuit and now the Ninth Circuit vary from this Court's decisions and also the decision of the Tenth Circuit in *Ramirez*, briefed above.

B. If the Eleventh Circuit had used the correct analysis, it would have reached a different result. The Eleventh Circuit should not have reversed the trial court, and directed it to grant qualified immunity to Baugh.

Martin's case presents the Court with a proper opportunity to reform undisciplined qualified immunity practice in the lower courts. Martin has already shown this Court that matters of public corruption are "inherently" of public concern. *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996). A matter affecting the safety and performance of police officers, firemen and ambulances is obviously a matter of public concern. Martin has *alleged* that he spoke to his city councilman, and to the Fraternal Order of Police, regarding the corruption being practiced in the selection of safety equipment to be used by the police department. He has also shown, with evidence, his statements. He has also alleged and shown the terrible harassment that he suffered as a result. The Court may note that much of the harassment of Martin by Baugh was recorded. These tapes speak loudly of the way he was mistreated, on the job. The evidence that Martin has already offered in this case shows, from Baugh's own mouth, the direct link between Martin's statements and the retaliation.

Under the correct application of the law, Martin obviously has shown his "clearly established right" not to be persecuted for his statements of public concern. Under a correct application of *Connick*, and related decisions, the burden is now upon Baugh to justify his unreasonable conduct, by showing an outweighing government interest.

In this case, there has been no such showing. Indeed, the Eleventh Circuit didn't even consider the proof. It concluded that Martin had not even *alleged* that his speech was protected, because the Eleventh Circuit holds that Martin *first* has to show that his speech would pass the fuzzy balancing test, by citing a "materially similar" case. The Eleventh Circuit holds that Martin has to preemptively dispose of Baugh's defense of justification. In short, the Eleventh Circuit has turned *Connick* on its head. The result is that proven public corruption is protected – the advisory jury found that there was corrupt influence in the transaction that Martin spoke about.

CONCLUSION

Martin has shown this Court the way that the Eleventh Circuit has erred by holding that Martin must undertake *Pickering* balancing to show that his speech is protected. This is a fundamental error by the Eleventh Circuit, and causes it to reach an erroneous result. This error of law will affect all future cases in the Eleventh Circuit, and will unavoidably chill the speech of public employees in this circuit, a result this Court has always sought to avoid. Furthermore, Martin has shown how comparing the Ninth and Tenth Circuits reveals this same error of torpedoing people like Martin by failing to give them the benefit of the correct analysis for public concern and clearly established right, which looks only at whether the employee has spoken out on a matter of public concern, and not whether the defendant might succeed in justifying his retaliation.

Martin's case provides this Court with an excellent opportunity to address a very serious matter of public interest. As this Court has observed, public employees are often the persons best situated to help expose mistakes and even corruption in government. This Court has always shown a due regard for our need to hear from conscientious public employees. This Court should intervene now to protect the rights of Martin and others like him in the Eleventh Circuit, and other circuits in this nation.

Respectfully submitted,

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